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CASEBOOK

FOR

COMPETITION POLICY

PROFESSOR EDWARD IACOBUCCI

2001/2002

University of Toronto

Faculty of Law

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Canadian Competition Bureau Website: **http://strategis.ic.gc.ca/SSG/cto1250e/html**

Canadian Competition Policy Page: **http://csgb.ubc.ca/ccpp/frame_1.htm**

U.S. Department of Justice, Antitrust Division: **http://usdoj.gov/atr/index.html**

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A COMPARATIVE OVERVIEW OF THE EVOLUTION OF COMPETITION POLICY

I. The History of Antitrust Law in the United States

In the latter half of the nineteenth century the economy in the United States became national in scope.[1] Territorial expansion westward had driven the development of extensive railways and, eventually, communication systems, which in turn provided the means for interregional trade. These and other innovations, such as the development of sophisticated capital markets, allowed firms to expand beyond the constraints of their immediate markets, and soon big businesses were a major force in the U.S. economy. This development, however, was the source of discontent in many quarters, particularly among consumers, small businessmen and farmers.[2] Dissatisfaction was particularly directed towards the increasing prominence of the use of trusts, whereby stocks of competing companies were transferred to trustees who proceeded to manage the industry in question. The elimination of competition entailed by these trusts became increasingly unpopular, and one view is that the *Sherman Act of 1890*[3] was passed in partial

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[1] For an outline of the economic history of the U.S. leading up to the *Sherman Act*, see B.Dunlop, D.McQueen & M.Trebilcock, *Canadian Competition Policy* (Toronto: Canada Law Book, 1987) at 8-18. See also A.Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Harvard University Press, 1977).

[2] Dunlop, McQueen and Trebilcock, *op.cit.* at 16.

[3] 26 Stat. 209.

response to this pressure. This *Act* was passed by a margin of 242-0 in the House, with 85 abstentions,[4] which supports contentions such as Letwin's that, "[t]he *Sherman Act* was passed in response to public demand."[5]

A more cynical view is that the *Act* was the result of political horse-trading. Three months after its passing, Senator John Sherman, who, as the name indicates, promoted the *Sherman Act*, sponsored a bill popularly known as the "Campaign Contributors' Tariff Bill," but known more formally as the McKinley Tariff.[6] This sequence of events has led some commentators to interpret "these two pieces of legislation as a political logrolling exercise,"[7] whereby the *Sherman Act* assuaged small business and farmers, while the McKinley Tariff protected big business.

Whatever its motivation, the *Act* became law in 1890. Its substantive provisions are remarkably brief:

> Section 1: Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal...

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[4] T.Kovaleff, "Preface", (1990) 35 Ant.Bull 1 at 3.

[5] W.Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Act* (Chicago: University of Chicago Press, 1965) at 15.

[6] See M.Trebilcock, "Competition Policy, Trade Policy, and the Problem of Second Best" in R.Khemani & W.Stanbury, (eds.), *Canadian Competition Law and Policy at the Centenary* (Halifax: Institute for Research on Public Policy, 1991) 29 at 31.

[7] Trebilcock, *op.cit.* at 32, describing the views of T.DiLorenzo, "The Origins of Antitrust: An Interest Group Perspective," (1985) 5 *International Review of Law and Economics* 73.

> Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...

The *Sherman Act* in large part embodied tenets of the common law; indeed, Sherman himself stated that the *Act* "does not announce a new principle of law, but applies old and well-recognized principles of the common law."[8] With its passing, however, enforcement became a governmental matter, as well as a private matter. The government was given responsibility for taking action against anticompetitive behaviour, but this was shared with private plaintiffs who were permitted to launch suits if they had suffered damages as the result of this behaviour. To encourage such actions, the *Act* provided for treble damage awards in successful suits.

The reaction of economists to the *Act* was almost uniformly negative. In what was a precursor to the more recent emergence of the "Chicago School"[9], many economists of the time believed that the restrictions on combinations would simply eliminate economies of scale. At an important meeting of economists, The Chicago Trust Conference, the consensus was that high concentration levels, which the *Sherman Act* was designed to discourage, were the result of "natural industrial evolution" and were therefore efficient - a

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[8] 21 Cong.Rec. 2456 (1890), cited in Gellhorn, *op.cit.* at 20. For a discussion of these common law origins, see M.Trebilcock, *Common Law of Restraint of Trade* (Toronto: Carswell, 1986) chap.1.

[9] See discussion below.

sort of Darwinian theory of natural economic evolution.[10]

Despite this general lack of enthusiasm for enforcing antitrust law, there were some significant developments in the early years of the *Sherman Act*. For example, the U.S. Supreme Court held in 1897 in *United States v. Joint Traffic Association*[11] that some horizontal arrangements, such as price-fixing, were *per se* illegal; that is, they may be condemned without the court engaging in a full-blown rule-of-reason inquiry. In *Dr.Miles Medical Co. v. John D. Park & Sons Co.*[12] the U.S. Supreme Court extended this strict rule to some vertical arrangements, holding resale price maintenance to be *per se* illegal. Later other vertical arrangements, such as tying and exclusive dealing, were also deemed to be *per se* illegal.[13]

On balance, however, despite the *Sherman Act*'s invitation to introduce significant changes to antitrust policy, "enforcement was spotty until the presidencies of Theodore Roosevelt and [William]

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[10] See H.Hatfield, "The Chicago Trust Conference" (1899) 8 J.Pol.Econ. 1, cited in H.Hovenkamp, "Antitrust Policy After Chicago" (1985) 84 Mich.L.Rev. 213 at 220 note 41.

[11] [1897] 171 U.S. 505.

[12] [1911] 220 U.S. 373.

[13] In *Times-Picayune Pub. Co. v United States*, [1953] 345 U.S. 594, the U.S. Supreme Court held some tying arrangements (whereby the purchase of one good is conditional on the purchase of a different good) to be *per se* illegal, and in *Standard Oil Co. of California v. United States (Standard Stations)*, 337 U.S. 293, (later overruled by *Tampa Electric Co. v. Nashville Coal Co.*, [1961] 365 U.S.320) the Court held exclusive dealing arrangements to be illegal if they represented a significant dollar volume of commerce in a market.

Taft."[14] In response to this weakness, the 1912 Presidential election was fought largely on the antitrust issue. The Democratic Party, led by Woodrow Wilson, called for legislation to supplement the *Sherman Act* that would specifically outline various antitrust defences, rather than leaving the matter entirely to the judiciary as the *Sherman Act* did. The Republicans and the Progressive Party, under Theodore Roosevelt, also called for additional legislation to strengthen the *Act* by sanctioning a greater variety of practices, such as "unfair" commercial practices, but they were reluctant to attempt to significantly increase its precision.

The *Clayton Act of 1914*[15] emerged from this political debate. Drafted to complement the *Sherman Act*, the *Clayton Act* broadened the scope of antitrust policy by making certain mergers, price discrimination, tying and exclusive dealing contracts, and interlocking directorates (whereby competing companies had common board members) unlawful if they "substantially lessened competition." At the same time, the *Federal Trade Commission Act*[16] was passed, which established the Federal Trade Commission (FTC). The *Act*'s only substantive provision, Section 5, states:

> unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Like the *Clayton Act*, no criminal sanctions were attached; the FTC was limited to issuing prospective decrees.

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[14] Kovaleff, *op.cit.* at 4.

[15] 38 Stat. 730.

[16] 38 Stat. 717.

The FTC's responsibility for antitrust was, and is, shared with the Department of Justice (DOJ). While any overlap in the jurisdictions of the FTC and the DOJ was ostensibly limited to joint enforcement of the *Clayton Act*, in practice there is also significant overlap in enforcing the *Sherman Act*, with the exception of criminal investigations which remained under the domain of the DOJ, given that violations of this *Act* are generally considered to be unfair within the meaning of the *FTC Act*.

As a result of these legislative changes, and a philosophical change under President Wilson, antitrust enforcement entered its first wave of vigorous activity.

Economists, however, remained sceptical of this interference with the workings of the free market. As summarized by Hovenkamp,

> [d]uring this period, roughly 1890-1930, American economists developed a set of theories that found consumer benefits in concentration and large firms probably to a greater extent than did any economic model until the rise of the Chicago School.[17]

This view perhaps contributed to the short life span of the first wave of enforcement. Rather than expanding the scope of antitrust law, soon legislative additions to the *Sherman Act* narrowed its application. For example, the *Webb-Pomerene Act of 1918*[18] exempted export cartels from the ambit of antitrust law, and the *Merchant Marine Act of 1920*[19] did the same for marine insurance.

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[17] Hovenkamp, *op.cit.* at 220.

[18] 40 Stat. 516.

[19] 41 Stat. 988.

This weakening of antitrust law continued into the Great Depression when the National Recovery Administration encouraged cartels as a means of supporting higher prices. However, shortly after the *National Industrial Recovery Act* was declared unconstitutional in 1935, the Administration brought Thurman Arnold and others committed to revamping antitrust policy to the DOJ.[20] This spawned another wave of antitrust activity, which included the passage of the *Robinson-Patman Act*[21] in 1936, which outlawed price discrimination.

While World War II ended this renewed vigour, this lapse was only temporary. Following the work of Arnold and other antitrust activists in the late 1930s early 1940s, the "workable competition" theory of J.M.Clark emerged. This theory worked from the premise that perfectly competitive markets were unlikely to occur due to product differentiation, but antitrust policy could be used to promote the highest levels of competition possible. The turning of the tide was evident in 1950, when merger law was strengthened by the *Celler-Kefauver Act*[22] which closed various loopholes[23] in the *Clayton Act* with respect to mergers.

The influence of the "workable competition" theory was

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[20] For a statement of Arnold's interventionist views, see T.Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937).

[21] 15 U.S.C.A.

[22] 64 Stat. 1125.

[23] For example, the *Clayton Act* merger provision (s.7) only applied to acquisition of stock, not assets; the amendment removed this loophole.

supplemented by the emergence of the "structure-conduct-performance" school in the late 1950s. Led by Harvard economist Joe Bain, this school held that economies of scale were generally not substantial, that barriers to entry to markets were often high, and that anticompetitive behaviour began at relatively low levels of industry concentration.[24] Bain concluded from such findings that antitrust law should be vigorously enforced. This played a significant role in bringing about the most spirited period of antitrust activity in U.S. history. In the 1960s and early 1970s, possibly anticompetitive behaviour was pursued with unprecedented zeal. For example, in *Brown Shoe Co. v. United States*[25] the U.S. Supreme Court blocked a merger that would have created a firm with 4.5% of the U.S. shoe production market, and 2.3% of the shoe retail market. Such remarkable decisions led Stewart J. in dissent in *United States v. Von's Grocery Co.* to write: "[t]he sole consistency I can find is that in litigation under s.7 [of the Clayton Act], the Government always wins."[26]

More recently, however, antitrust policy in the U.S. reversed this trend yet again. Policy has been greatly influenced by "Chicago School" economists, who criticized the tendency of antitrust policy in the U.S. to protect small business at the expense of economic efficiencies associated with size. They argued that the purpose of antitrust law should be to maximize efficiency;

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[24] See discussion in Hovenkamp, *op.cit.*

[25] [1962] 370 U.S. 294.

[26] [1966] 384 U.S. 253 at 301.

other goals of social policy should be pursued through other instruments. As a result of this efficiency-oriented analysis, corporate concentration and mergers leading to high levels of concentration were viewed as likely to reflect, or to be likely to realize, superior efficiencies, while many vertical and some horizontal arrangements that had been condemned in the past were viewed by the Chicago School as socially desirable.[27] The antitrust policies of Presidents Reagan and Bush were influenced by this economic thinking, and "enforcement of the antitrust laws has dropped, except in respect of horizontal cartels."[28]

Thus U.S. antitrust policy has undergone significant swings over its century-old existence. While it is unclear as yet how the Clinton Administration will affect these trends, recent exclusionary or market foreclosure theories, such as "raising rivals' costs,"[29] may indicate the return to a greater suspicion of anticompetitive behaviour. There is thus reason to expect debate to continue well into the next century of U.S. antitrust

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[27] See, for example, Robert Bork's discussion of *United States v. Sealy, Inc.*, [1967] 338 U.S. 350 in R.Bork *The Antitrust Paradox* (New York: Basic Books, 1978) at 270-74. See more generally, H.Goldschmid, H.M.Mann & J.F.Weston, *Industrial Concentration: The New Learning* (Boston: Little, Brown & Co., 1974).

[28] R.Whish, *Competition Law*, 3d ed., (London: Butterworths, 1993) at 18.

[29] See S.Salop & D.Scheffman, "Raising Rivals' Costs," (1983) 73 Amer.Econ.Rev. 267. According to this theory, many practices of dominant firms, such as bidding up the price of scarce inputs, are pursued to maintain their dominant positions by raising their rivals' costs. See more generally, R.Ware, "Understanding Raising Rivals' Costs: A Canadian Perspective" (1994, unpublished).

policy.[30]

II. The History of Competition Law in Canada

Canada was the first jurisdiction in the world to adopt an antitrust statute, with the enactment of the federal *Anti-Combines Act* in 1889[31] - one year before the enactment of the U.S. *Sherman Act*.[32] As is true in the U.S. with the *Sherman Act*, there is some debate over the motivations of its progenitors. While some claim that the *Act* was the result of public dissatisfaction with large combines, others argue that it was largely designed to ease political pressure resulting from the erection of large tariff barriers in the National Policy of 1879, which was adopted by the same Conservative government. Conservative N.Clarke Wallace championed the bill as a "terror to evil-doers", but historian Michael Bliss characterized this statement as,

> fraudulent political posturing, designed partly to continue to enhance Wallace's popular reputation as the enemy of combines, and almost certainly also as part of a calculated Conservative manoeuvre to deflect criticism from the combine-creating effects of the protective

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[30] See H.Demsetz, "How Many Cheers for Antitrust's 100 Years?" (1992) 30 Economic Inquiry 207.

[31] S.C. 1889, c.41. For discussions of the origins of the Act, see C.Baggaley, "Tariffs, Combines and Politics: The Beginning of Canadian Competition Policy, 1888-1890" in S.Khemani & W.Stanbury, (eds.), *Historical Perspectives on Canadian Competition Policy*, (Halifax: Institute for Research on Public Policy, 1991) 1; M.Bliss, "The Yolk of the Trusts: A Comparison of Canada's Competitive Environment in 1889 and 1989" in Khemani & Stanbury, (eds.), *op.cit.* 239; and J.Benidickson, "The Combines Problem in Canadian Legal Thought, 1867-1920" (1993) 43 U.T.L.J. 799.

[32] 26 Stat. 209 (1890).

tariff.[33]

The initial focus of the *Act* was on combinations amongst horizontal competitors - principally price fixing and market allocation arrangements - which were made subject to criminal sanctions.[34] In 1910, the *Act* was amended to extend these sanctions to mergers or monopolies where these operated or were likely to operate to the public detriment.[35] In the mid-1930s, following recommendations of the Royal Commission on Price Spreads,[36] which was concerned about so-called destructive competition in many sectors during the Great Depression, price discrimination and predatory pricing were added to the list of criminal offenses. In 1952, following the recommendations of the MacQuarrie Committee[37] which was set up to investigate inflationary pressures in the post-World War II boom (now prices were thought to be too high, rather than too low), resale price

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[33] M.Bliss, "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910" (1973) 47 Business History Review 177 at 182.

[34] For a discussion of the early years of Canadian competition policy, see Benidickson, *op.cit.*; and P.Gorecki & W.Stanbury, "The Administration of and Enforcement of Competition Policy in Canada, 1889 to 1952" in Khemani & Stanbury, (eds.), *op.cit.* 53.

[35] *Combines Investigation Act of 1910*, S.C.1910, c.9.

[36] *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935).

[37] *Interim Report on Resale Price Maintenance* (Ottawa, Queen's Printer, 1952).

maintenance was added as a criminal offence,[38] and the Restrictive Trade Practices Commission (R.T.P.C.) was set up to conduct inquiries into possible offenses and recommend prosecutorial action where appropriate.[39] At the same time, the Director of Investigation and Research of the Competition Policy Bureau was created as a specialized enforcement officer.[40] This remained the structure of Canadian competition law for more than two decades thereafter.

In part because of constitutional concerns as to the ability of the Federal Government to enact competition laws other than pursuant to the exercise of its criminal law jurisdiction, all these laws were criminal in nature and were enforced through criminal prosecutions in the ordinary criminal courts. Over the first eighty years of Canadian competition law, prosecutorial attention was focused principally on the conspiracy provisions, and since 1952, also on the resale price maintenance provisions. Almost no prosecutions were brought under the price discrimination and predatory pricing provisions, and very few were brought with respect to mergers or monopolizations, and even fewer succeeded. It should also be noted that there was no provision for any civil right of action for breach of any of these provisions. Thus, in

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[38] S.C.1951 (2nd Sess.), c.30, s.1. For a discussion of the origins of the resale price maintenance provisions, see T. Hunter, "History of Price Maintenance in Canada" in Khemani & Stanbury, (eds.), *op.cit.* 177.

[39] *Combines Investigation Act*, R.S.C.1952, c.314.

[40] *Ibid.*

contrast to U.S. antitrust law, and more recently European Community (EC) competition law, administrative review of competitive practices (in the U.S. by the Federal Trade Commission; in the EC by the European Commission), and civil rights of action (e.g., the treble damage action in the U.S. for violation of the *Sherman Act*[41]), were essentially absent from the Canadian competition law domain.

In 1967, the Federal Government asked the Economic Council of Canada to undertake a fundamental review of Canadian competition law and recommend proposals for reform. In its so-called *Interim Report on Competition Policy*,[42] issued in 1969, the Economic Council called for a sweeping reformulation of Canadian competition laws, with sharply reduced reliance on criminal sanctions, correspondingly increased reliance on expert economic review, and a significant role for private rights of action. In 1971, the Federal Government introduced a Bill that sought to implement most of the Economic Council's recommendations,[43] but this Bill attracted a storm of criticism from both the business and legal communities, and was withdrawn from Parliament. The Federal Government then decided to proceed with reform in two stages. In 1976, a set of Stage One reforms was enacted that extended the scope of the *Act* from goods to services, tightened up aspects of

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[41] *Clayton Act*, 15 U.S.C. s.15 (1988).

[42] Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

[43] *Competition Act*, Bill C-256.

the conspiracy provisions, made bid rigging a *per se* offence, provided for a single damage right of action for violation of the criminal provisions in the *Act*, and introduced a set of reviewable vertical practices, i.e., refusal to supply, exclusive dealing, market restrictions, tied selling, and consignment selling, that were subject to rule-of-reason review by the Restrictive Trade Practices Commission at the instance of the Director and in appropriate cases to cease and desist orders.[44] However, the central issues of controversy, ie. how to deal with mergers and monopolies, were postponed for further consideration. Finally, after a number of false starts, in 1986, the new *Competition Act*[45] (the Stage Two amendments) was adopted by Parliament. This *Act* abolished the Restrictive Trade Practices Commission and replaced it with the new Competition Tribunal[46] (a mixed body comprising Federal Court judges and non-judicial experts), vesting in the Tribunal extensive review powers with respect to mergers and monopolization (called in the *Act* "abuse of dominant position"[47]) on application for relief by the Director of Investigation and Research. These activities were removed from the criminal law. The Tribunal also assumed the R.T.P.C.'s review functions with

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[44] S.C.1974-75-76, c.76.

[45] S.C.1986, c.26. For a discussion of the process that led to the passage of the Act, see I.Clark, "Legislative Reform and the Policy Process: The Case of the Competition Act" in Khemani & Stanbury, *op.cit.* 227.

[46] *Ibid.*, s.3.

[47] *Ibid.*, s.46.

respect to vertical practices. The civil damage right of action introduced in the Stage One amendments in 1976 relates only to breaches of the criminal prohibitions in the statute (with or without a prior criminal conviction), and not to any of the reviewable practices.[48] Private parties, beyond complaining to the Director, have no direct access to the Tribunal, although in the event of the Director initiating proceedings before the Tribunal, private parties may be granted standing by the Tribunal in the ensuing proceedings.

This process of historical evolution of Canada's competition laws has, in effect, resulted in a two-track process of review of competitive practices: the first is the criminal law track where Federal or Provincial Attorneys General can bring prosecutions in the criminal courts for breach of the criminal prohibitions in the *Act*. The second is the administrative review track that entails the initiation of proceedings before the new Competition Tribunal by the Director. A third and less practically important track also exists in that there is now a possibility of private rights of action being brought in the civil courts for breach of the criminal prohibitions in the *Act*, but to date this right had been very sparingly exercised (partly because of constitutional doubts, only recently resolved, as to the validity of the provision[49]).

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[48] *Combines Investigation Act*, R.S.C.1970, c.C-23, s.31.1.

[49] The constitutionality of the provision was confirmed by the Supreme Court of Canada in *General Motors of Canada, Ltd. v City National Leasing*, [1989] 58 D.L.R. (4th) 255.

III. The History of the Competition Law of the European Community

On April 18, 1951 France, Germany, Italy, The Netherlands, Belgium, and Luxembourg became signatories to the Treaty of Paris creating the European Coal and Steel Community.[50] This marked the beginning of pan-European competition policy. Of the current Member States of the European Community only Britain and Germany had comprehensive competition laws, although even these only originated in the immediate post-war period. The purpose of the Treaty was to establish a Common Market in the coal and steel markets in order to enhance "economic expansion, growth of employment and a rising standard of living in the Member States".[51] This agreement called for the abolition of perceived impediments to this objective, including tariff and non-tariff barriers to trade. Furthermore, Article 4 of the Treaty called for the removal of restrictive practices "which tend toward the sharing or exploiting of markets."[52]

The concern about competition arose for several reasons. One was simply that the industries covered by the Treaty were plainly not competitive in the post-war years, and U.S. experience convinced many that pursuing competitive markets through competition policy would promote economic efficiency. This was not, however, the sole reason for competition policy. The

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[50] *Treaty Establishing the European Coal and Steel Community*

[51] Article 1 of the Treaty of Paris, cited in D.G. Goyder, *EC Competition Law*, 2d ed., (Oxford: Clarendon Press, 1993) at 18.

[52] Article 4 of the Treaty of Paris, cited in Goyder, *op.cit.* at 18.

abolition of restrictive practices was also designed to prevent incumbent firms in each of the Member States from dividing up the Common Market by country, which would circumvent the very purpose of the Treaty. That is, competition policy was seen as a tool to further the integration of the Member States.

This motivation continued to influence European attitudes towards competition law and was incorporated into the Treaty of Rome, which was signed on March 27, 1957.[53] This Treaty, which grew out of the successes of the Treaty of Paris, was intended, *inter alia*, to integrate the entire economies of the Member States, not simply certain sectors. It was recognized during preliminary discussions that competition policy would be a valuable tool for achieving this objective. An initial report on the prospects for a new Treaty, the Spaak Report, stated:

> the Treaty will have to provide means of ensuring that monopoly situations or practices do not stand in the way of the fundamental objectives of the Common Market. To this end it will be necessary to prevent--
> - A division of markets by agreement between enterprises, since this would be tantamount to re-establishing the compartmentalisation of the market...[54]

Thus Articles 85 and 86 were included in the Treaty of Rome.

Article 85(1) prohibits as incompatible with the Common Market,

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the

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[53] *Treaty Establishing the European Economic Community*, March 25, 1957, 298 U.N.T.S. 3 (1958).

[54] Paul-Henri Spaak, The Spaak Report, cited in Goyder, *op.cit.* at 25.

> common market...

Article 86 was directed at firms with a dominant position. It provides,

> [a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states.

These Articles, and the establishment by the Treaty of a Directorate of the European Commission which was responsible for enforcing competition policy,[55] were intended to promote both efficiency and the integration of Europe as an end in itself. To this latter end, the Community's jurisdiction extends only to transactions or practices with a "Community dimension," purely local transactions or practices being governed by the domestic competition laws of the member states.

However, the Treaty failed to establish an effective competition policy until the approval of Council Regulation no. 17[56] by the European Council on February 6, 1962.[57] This regulation set out various procedural rules for implementing Articles 85 and 86 of the Treaty, such as complaint procedures and rules for notifying the Commission of agreements undertaken. This had profound effects on EC competition policy. Prior to the passage of Regulation 17, DG IV had investigated only 33 cases and

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[55] Hereinafter, "DG IV."

[56] Council Regulation No.17/62, 13 J.O. 204 (1962) [hereinafter Regulation 17].

[57] The Regulation became effective on March 13, 1962.

had not issued a formal decision on any case.[58] As Daniel Holley put it, "It was in 1962 that the practice of EEC competition law began, upon the issuance of Council Regulation No. 17."[59]

Over the next several years, EC competition law began to take shape. While starting slowly, the number of DG IV decisions increased annually. To illustrate, in 1972 the Commission issued its *First Report on Competition Policy* covering the period 1962-71, which listed 51 cases decided under Article 85, of which 19 were decided in 1971.[60] Furthermore, all three Article 86 cases listed were decided in 1971. As Holley states: "[t]he acceleration was obvious."[61]

The next major development in EC competition law was the development of block exemptions. Rather than devoting resources to reviewing all arrangements on a case-by-case basis, the Commission opted to exempt certain classes of arrangements from competition scrutiny. Notifications of arrangements pursuant to Regulation 17 had become a deluge, and block exemptions were seen as a means to reduce extraneous administrative costs. Thus on March 2, 1965 Regulation 19/65 was adopted, which gave the Commission the power to establish these block exemptions. The Commission subsequently issued block exemptions with respect to exclusive dealing

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[58] Goyder, *op.cit.* at 46.

[59] D.Holley, "EEC Competition Practice: A Thirty-Year Retrospective", (1993) Fordham Corp. L. Inst 669 at 670.

[60] Cited in Holley, *op.cit.* at 672.

[61] *Ibid.*

agreements,[62] exclusive distribution agreements,[63] and other types of agreements. Other arrangements are exempt from Article 85 scrutiny if they fail to meet the Commission's *de minimis* threshold,[64] are granted a negative clearance under Regulation 17 indicating the Commission's approval of the arrangement, or qualify for an exemption under Article 85(3). Article 85(3) exempts an agreement that,

> contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing customers a fair share of the resulting benefit...

Early European cases centred on agreements amongst competitors; merger policy did not begin to evolve until the 1970s. In the first case where merger policy became an issue, *Continental Can Co.*,[65] the Commission involved Article 86 to block a merger that, in its view, would have strengthened a dominant position. While the European Court of Justice annulled this decision on its facts, it approved the use of Article 86 to prevent anticompetitive

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[62] Commission Regulation No.67/67 of 22 March 1967, O.J. (1967) No 57 at 849.

[63] Commission Regulation No 1983/83 of 22 June 1983, O.J. Legislation (1983) No L173 at 1.

[64] According to the notice on Minor Agreements of 1970 (amended in 1977 and 1986), this threshold is not met if the parties to an arrangement together combine for less than 5% of total supply and where the aggregate annual turnover of the parties does not exceed 200 million ECU; see V.Korah, *EEC Competition Law and Practice*, 4th ed., (Oxford: ESC Publishing, 1990) at 43-44.

[65] O.J. L 7/25 (1972).

mergers.[66] This began discussions and debate about EC merger policy, which resulted in the passage of the 1989 Merger Regulation.[67] This Regulation outlined EC merger policy with respect to both procedure and substance, and merger reviews have subsequently increased to fifty cases a year, in contrast with one case in 1973.[68]

EC Competition Policy and Law has thus changed dramatically in a relatively short time. As Holley states:

> [a]n annual review of U.S. antitrust law shows a complex but slow progression resulting mainly from a multitude of court cases, with legislation by and large affecting only the fringes, more like the movement of a glacier. The image produced by an annual review of EEC competition law is more like that of an avalanche, where the flow of new legislation is all important and the central role played by the Commission allows important changes often with little or no notice.[69]

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[66] *Europemballage Corp. & Continental Can Co. v. Commission*, [1973] 12 C.M.L.R. 199.

[67] Council Regulation No. 4064/89, amended by O.J. L 257/14 (1990).

[68] See Dietrich Kleeman, "First Year of Enforcement Under the EEC Merger Regulation: A Commission View" (1991) Fordham Corp. L. Inst. 623 at 624.

[69] Holley, *op.cit.* at 674.